

NO. 32431-1-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE**

In re the Custody of
Z.C., Child

Melissa England,
Appellant,

and

Dalenna and Richard Vaughn,
Respondents.

**BRIEF OF *AMICI CURIAE*
NORTHWEST JUSTICE PROJECT AND
LEGAL VOICE**

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A. INTRODUCTION

This case presents circumstances *amici* see often: a parent in crisis faces barriers to caring for her¹ children, barriers that could be addressed if she received the support and help she needs. Sometimes, the parent needs treatment to overcome addiction to substances, as Ms. England did in this case. In other cases, a parent may need mental health services. Or the parent may be homeless because she lost her job or is escaping domestic violence. Perhaps the parent is facing incarceration.

This case illustrates a serious disparity in how Washington law addresses situations in which a parent faces barriers in caring for her children. In cases where the State becomes involved and a child has been found dependent under RCW 13.34, Washington has a clear and strong public policy to promote reunification of parents and their children. Among other things, the dependency laws require the State to provide parents with necessary services to address their parenting deficiencies. The dependency laws also provide parents a right to effective legal representation (paid by the State if needed) and set strict procedures at every step in the dependency process to advance the ultimate goal of returning children to their parents.

Washington law also provides a private action for non-parental

¹ For ease of reference, *amici* use the pronouns “she” and “her,” while recognizing that parents who face these problems are both female and male.

custody under RCW 26.10, which allows any person to seek custody of a child. Unlike a dependency under RCW 13.34, a parent responding to a non-parental custody action under RCW 26.10 is left on her own. In such cases, the State has no duty to provide services to help the parent overcome deficiencies, nor does the parent have a right to be provided effective assistance of counsel.

As a result, parents who face private non-parental custody actions often agree to entry of orders, believing it will allow a relative or friend to temporarily care for their children until they overcome their parenting deficiencies. But in reality – and as starkly illustrated by this case – parents who agree to non-parental custody orders and who subsequently remediate their parenting deficiencies may later find themselves forever unable to reunite with their children.

This Court recognized that fundamental constitutional rights may be implicated when a parent who agrees to a non-parental custody order cannot seek modification of the order. *In re Custody of T.L.*, 165 Wn. App. 268, 268 P.3d 963 (2011). *Amici* urge the Court to ensure that parents like Ms. England may seek to regain custody of their children when the barriers that prevented them from caring for their children are remediated.

B. IDENTITY AND INTEREST OF *AMICI*

The Northwest Justice Project (NJP) is the largest statewide

publicly funded provider of civil legal services in Washington. NJP's mission is to secure justice for low-income persons through high quality legal advocacy that promotes the long-term well-being of individuals, families, and communities. NJP is deeply interested in ensuring that the rights of low-income persons and their children are fully protected.

This case presents an opportunity for NJP to address serious concerns regarding the inability of a fit parent to modify a non-parental custody order after the parent has remediated all areas of concern. Each year NJP attorneys advise many parents in similar circumstances: parents who responsibly seek help caring for their children during a time of crisis only to lose custody with no hope of regaining it, regardless of how much they rehabilitate, unless something dire happens to the third-party caregiver or the child – something completely outside the parent's control.

NJP has a strong interest in ensuring that all parents, whether involved in dissolution, dependency or non-parental custody cases, have an opportunity to parent their children once they have corrected their parenting deficiencies. As the law is currently interpreted, a parent who makes a decision, in the best interest of their child, to allow a third party to care for their child when the parent cannot, has no recourse within their control to regain custody once they have corrected their parenting deficiencies. Parents may be reluctant to place a child with a third party caregiver if they fully understand that regaining custody is next to

impossible. It also removes incentive for the parent to address their problems. But, worst of all, it denies a child their parent. In the case before the court, the child already lost his father who died before he was born. Losing his mother is detrimental to his health and well-being.

NJP's interest in this matter is to ensure that the best interests of the child are considered together with the rights of his parent.

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a non-profit public interest organization dedicated to protecting the rights of women and their families through litigation, legislative advocacy, and the provision of legal information and education services. Legal Voice has developed expertise in many areas of law pertaining to women's rights, including family law. Legal Voice has participated as counsel and as *amicus curiae* in family law cases throughout the Northwest and the country, and advocates in the Washington State Legislature on family law issues affecting women and their children. Recently, Legal Voice successfully advocated in the Washington Legislature to win passage of a law to help prevent termination of parent-child relationships when a parent is undergoing substance abuse treatment or has been unable to afford necessary services to remedy parenting deficiencies (HB 2140 in 2015), as well as a law to help preserve relationships of incarcerated parents and their children (SHB 1284 in 2013). Legal Voice has a strong interest in this matter because it raises

important questions about the ability of mothers to regain custody of their children after overcoming a temporary parenting deficiency.

C. ISSUES ADDRESSED BY *AMICI*

1. Whether children's interests are best served when a fit and caring parent has no means to modify a non-parental custody order.
2. Whether public policy is violated by a law which removes incentive for parents in distress to place their child(ren) with a third party caregiver.
3. Whether public policy is violated by a law which removes incentives for parents to correct deficits in their lives so they are able to parent.

D. STATEMENT OF THE FACTS

We adopt the statement of facts set forth in appellant's brief.

E. ARGUMENT

1. **It is in the best interests of children for a fit and caring parent to have the means to modify a non-parental custody order.**

Out-of-home placement often has far reaching consequences for children and parents. It must remain a last resort, both for constitutional and public policy reasons. "Maintaining the family unit should be the first consideration in all cases of state intervention into children's lives." *In re Dependency of K.N.J.*, 171 Wn.2d 568, 575, 257 P.3d 522 (2011).²

Furthermore, "children have rights regarding their well-being that are

² Quoting the joint resolution of the 1976 House and Senate, Comm. on Soc. And Health Servs., Substitute H. Concurrent Res. 46, at 1, 44th Leg., 2d Ex.Sess. (Wash. Feb. 6, 1976). House Bill 371, the legislation that established our current termination statute.

important factors properly guiding court's custody decisions." *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 346, 227 P.3d 1284 (2010).

Returning children to their parents when possible remediates the damage of parental separation. Children's well-being is negated when perpetuating non-parental placement even after a parent has remediated their deficits.

a. Current non-parental custody statute does not protect parents or children.

Parents have a fundamental liberty interest in the care and custody of their children. *In re Luscier*, 84 Wn. 2d 135, 136, 524 P.2d 906 (1974). That right is described as being rooted in the natural and the common law, and as a right that is "more precious than the right to life itself". *In re Dependency of J.H.*, 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). It is presumed that "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 583, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979). Accordingly, only under "extraordinary circumstances" may the state find a compelling interest to justify interference with the integrity of the family and with parental rights. *In re Custody of Shields*, 157 Wn.2d 126, 142-43, 136 P.3d 117 (2006).

Moreover, in parentage and child custody disputes the court affords "considerable deference" to parents as it balances the parent's fundamental right to make decisions concerning the care of their children. *In the Matter of the Custody of B.M.H.*, 179 Wn.2d 224, 234, 315 P.3d 470

(2013). There is a strong preference for parental custody. *In re Custody of C.C.M.*, 149 Wn. App. 184, 206, 202 P.3d 971 (2009).

The current non-parental custody statute does not offer a parent assistance to remediate parenting deficiencies, nor does it provide a path to reunite a child with a fit parent. Deference to the parent is ignored, as is the importance to a child in being raised by a fit parent. The clearly stated Washington policy of maintaining family integrity is ignored in the non-parental custody statute, to the detriment of parents and children.

b. Under the dependency statute maintenance of the family unit is the goal.

The dependency statute properly considers a parent's fundamental right to the care and custody of their children. In doing so, it provides the "considerable deference" required by case law. This is in sharp contrast to the application of the non-parental custody statute.

In the dependency statute, the Washington State Legislature declared the family unit "a fundamental resource of American life which should be nurtured." RCW 13.34.020. It continues by stating the family unit should "remain intact" under most circumstances. *Id.* To that end, the dependency statute requires the Department of Social and Health Services (the Department) to coordinate and integrate services to children and families to address parent deficiencies. RCW 13.34.025(1)(a). With the ultimate goal of returning children to their parent(s), the statute specifies

what steps must be taken to help facilitate family reunification through every stage of the process.

In a dependency, the Department is required to submit a permanency plan specifying what services will be offered and what requirements the parents must meet to resume custody of the child. RCW 13.34.136(1); RCW 13.34.136(2)(b); RCW 13.34.136(2)(b)(i). The Department coordinates these services and “to the maximum extent possible under current funding levels,” must assume the costs associated with remedial services if the parent is unable to pay. RCW 13.34.025. The status of the case must be reviewed by the court every six months. RCW 13.34.138. If the Department fails to provide services to remediate the parents’ deficiencies, a petition to terminate the parents’ rights cannot prevail. RCW 13.34.180(1)(d); RCW 13.34.190. Therefore, throughout the dependency process, the Department is required to not only develop a plan for family reunification, but to pay for and help facilitate the successful completion of that plan.

By contrast, once adequate cause is established in a non-parental custody case under RCW 26.10, neither the State nor the non-parent is under any obligation to create a reunification plan with the parent, identify requirements the parent must meet to regain custody of their child, or do anything to facilitate family reunification. As a result, although both a dependency and non-parental custody action may begin from similar

circumstances, the outcomes of an adequate cause finding in a non-parental custody case are much more permanent and severe. This is especially alarming considering that an adequate cause hearing for a non-parental custody case is often a brief hearing based only on a motion and affidavit.

In a dependency, even after an equivalent finding of unfitness is made, a parent has many opportunities to both address parenting deficiencies and be reunited with their child.³ The current operation of the non-parental custody statute is that one instance of adversity in a parent's life may result in a permanent loss of custody.⁴ As Respondents

³ See RCW 13.34.136, stating that a permanency plan shall be developed no later than 60 days from the time the supervising agency assumes responsibility, shall include what steps will be taken to return the child home, and shall specify what services will be offered to enable to parent to resume custody. See also RCW 13.34.138, stating that the status of dependent children shall be reviewed by the court at least every six months, and if the dependent children are not returned home the court shall establish in writing whether the Department or supervising agency is making reasonable efforts to provide services and eliminate the need for out-of-home placement. See also RCW 13.34.150, stating that any dependency order may be modified "only upon a showing of a change of circumstances."

⁴ Even though Washington's dependency statute suggests, for the purposes of stability, that a termination petition ordinarily be filed if a child is in out-of-home placement for 15 out of 22 months, there are good cause exceptions to that rule. RCW 13.34.145 (providing a non-exhaustive list of exceptions). The good cause exceptions specifically include discretion to defer a termination petition if a parent is obtaining long-term substance abuse treatment and is complying with treatment goals, which the Legislature recently made a permanent specific exception. Laws of 2015, ch. 257. Even if a petition is filed, the case goes to trial to determine whether it is in the child's best interests to terminate the parent's rights. RCW 13.34.190(1)(b). A petition for termination must allege and demonstrate that the Department offered services capable of correcting the parental deficiencies. RCW 13.34.180(1)(d). See also RCW 13.34.190(1). Even at the termination stage of a dependency action, statutory protections ensure that

themselves acknowledge, “[d]ependency gives the parents a time-line to get their lives together or face termination, whereas non-parental custody actions do not.” Resp. Br. at 24. This disparity in the statutes means that a parent like Ms. England who faces a remediable barrier to parenting her child would likely have a much better chance of being reunited with her child in a dependency case than in a non-parental custody case.

Our courts have determined that non-parental custody is unlike custody between parents. *In re Custody of C.C.M.*, 149 Wn. App at 206. The *C.C.M.* court found that in custody disputes between parents and non-parents, the parents’ constitutionally protected “priority right to custody of their children” must be accommodated. *Id.* Further, case law states that a non-parent custody order “confers only a temporary and uncertain right to custody of the child for the present time” and “when and if a legal parent becomes fit to care for the child, the non-parent has no right to continue a relationship with the child.” *In re Parentage of J.A.B.*, 146 Wn. App. 417, 426, 191 P.3d 71 (2008); see also, *In re Custody of J.E.*, No. 32062-6-III, slip op. at 6 (Wn. App. Div. III Aug. 4, 2015) (quoting *In re Custody of A.F.J.*, 179 Wn.2d 179, 186, 314 P.3d 971 (2013)).

Additionally, our courts recognize that “protecting a parent’s right to raise her or his child has sometimes required Washington and federal

family reunification was attempted. No such protections exist for non-parental custody actions.

courts to read special protections into custody and visitation statutes when a parent's interest conflicts with that of a non-parent." *In re Custody of T.L.*, 165 Wn. App. 268, 281, 268 P.3d 963 (2011).

However, as applied, the non-parental custody statute fails to acknowledge the parents' priority right when it comes to modifications of non-parental custody orders. Instead, the statute states "a court shall deny the motion to modify" unless it finds that adequate cause for hearing the motion is established by the affidavits. RCW 26.10.200. Only if the parent is able to allege that there has been a substantial change in the circumstances of the non-parent or the child will he or she be given an opportunity to modify the non-parental custody order. RCW 26.10.190 referencing RCW 26.09.260.

Courts are directed to proceed pursuant to RCW 26.09 when modifying parenting plans under the non-parental custody statute. *Id.* This statute pertains to modification of parenting plans between parents. It gives no deference to the paramount right of a parent.

For these reasons, the current non-parental custody statute fails to protect both a parent's priority right to their children's care and a child's interest in being raised by a fit parent.

2. Public policy is violated by a law which removes incentive for parents in distress to place their child(ren) with a third party caregiver.

Many parents face life challenges which may be particularly

devastating and leave them unable to care for themselves, much less their minor children. Whether these challenges arise from poor choices or unpredictable misfortune, public policy is best served when individuals are encouraged to seek help when needed. This is particularly true for parents with minor children. Public policy is further served when parents seek safe care for their children while they fully commit to getting the help they need. If, in doing so and agreeing to non-parental custody, a parent effectively forfeits their right to ever care for their child again, a disincentive is created for placing children out of harm's way.

If parents are put in the position of choosing between seeking help at the expense of permanently losing custody of their child or trying to endure a challenging situation with their children, many parents may choose the latter and try to push through difficult circumstances without assistance. While some of these households may eventually come to the attention of the State and result in removal of the children against the parent's will, others will not. (As discussed above, it should be noted that the children removed by the State have a far better chance of being reunited with their parents). For the children whose parents face challenges without help, the instability the children may face might well have been avoided if the parent were encouraged to get the help needed. By creating disincentives for parents to acknowledge they need help, we inadvertently place children directly in harm's way

3. Public policy is violated by a law which removes incentives for parents to correct deficits in their lives so they are able to parent.

To modify a non-parental custody order, a substantial change of circumstances in the non-parent or child's life is required. RCW 26.09.260. Therefore, regardless of how much parents rehabilitate and correct their parental deficiencies, they may never have their children live with them again. This is in stark contrast to the dependency modification standard, which favors family reunification at every step in the process and only requires a substantial change in the parent's life to return children to their parents. RCW 13.34.150. Due to the discrepancies in modification standards, parents who voluntarily place their children with non-parents are more harshly penalized for doing so than parents whose children are forcibly removed by the State through a dependency action.

Parents who agree to non-parental custody orders do so with the best intent. They often do not understand the severe consequences of their actions: no chance of ever having their child placed with them again unless something horrible - and out of the parent's control - happens to the child or the non-parent. This creates a disincentive for parents to rehabilitate.

If parents lose hope of having their children as a part of their day-to-day lives, many parents give up altogether. Hopelessness is one of the greatest barriers to recovery and rehabilitation. Ultimately, our State's

public policy is based on the premise that children do best when they are raised by their fit and caring parents. Society benefits when parents correct their deficiencies and rehabilitate. This is also best for children. Imposing a standard of a substantial change of circumstances of anyone other than the parent to modify non-parental custody orders does not promote a policy of healthy, united families.

F. CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court consider the children's interests in this matter and the public policy reasons in favor of providing a procedure by which children may be cared for by a fit and caring parent.

Dated: August 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 5th day of August, 2015, I caused true and correct copies of the following document:

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